The Madras Law Journal.

Vol. VI.] AUGUST 1896. [Part VIII.

AWARD OF INTEREST BILL.

Some time last year, a bill was introduced in the Viceregal Council by the Hon'ble Mohiny Mohun Roy for the purpose of regulating the award of interest in suits for simple money-debts and mortgage-debts. The object of the Bill is to place a limit upon the amount of interest which may be awarded by the courts and to mitigate to some extent the oppressive effects of usury. The Bill is one of the shortest and simplest and consists of only one section. It seeks to attain its object by giving legislative recognition to the principle of Damdupat known to Hindu Law. The Bill provides that no Civil Court shall in any suit for a simple money-debt or a mortgage-debt instituted after the commencement of the Act, decree or award interest exceeding in amount the original principal or where there has been payment in reduction of the principal, exceeding in amount the reduced principal. The word interest is explained as meaning the amount of interest due or payable at the date of suit, exclusive of payments previously made.

Before considering the expediency of the measure, it is well to take a glance at the past legislation on the subject of interest and the present state of the law in regard thereto and note the defects and anomalies in the existing system. So far as the Madras Presidency is concerned, the earliest piece of legislation is to be found in Madras Regulation XXXIV of 1802. This regulation fixed 12 per cent per annum as the maximum rate of interest. Where a lower rate of interest was stipulated between the parties, it was the rate to be enforced. Section 4 of this regulation laid down the rule now proposed to be enacted that courts cannot decree a greater sum for interest than the amount of principal. Section 5 prohibited the courts from awarding compound interest arising from intermediate adjustment where new bonds or agreements had been taken

and the interest had been merged in the principal. In regard to usufructuary mortgages even where there was an agreement that the usufruct should be taken by the mortgagee in lieu of interest, the mortgagee was entitled to interest only at the rate allowed on other bonds and the surplus of the usufruct, if any, was to be applied in discharge of the principal.

The next enactment was Act XXXII of 1839 by which the provisions of the statute 3 and 4 William, IV Ch. 42 S. 28, were extended to British India. Under this Act, upon all debts or sums certain payable at a certain time or otherwise, the court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums were payable under a written instrument at a certain time, or if payable otherwise, from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment.

By Act XXVIII of 1855 the laws in force relating to usury were repealed and it was enacted that in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate, if any, agreed upon by the parties, and if no such rate shall have been agreed upon, at such rate as the court shall deem reasonable. Agreements in usufructuary mortgages that the whole of the usufruct should be allowed in lieu of interest were declared to be binding on the parties. The last two enactments are still in force throughout the country and the courts have enforced contracts for the payment of interest however exorbitant. Where the rate of interest fixed by the contract is one uniform rate throughout the period during which the money is kept by the debtor, the courts have generally felt themselves bound to award interest at the rate agreed upon. But where the contract provides for one rate of interest at the inception and a higher rate on default, the courts have very often drawn a distinction between cases in which the higher rate of interest is agreed to be paid from the date of default and those in which it is agreed that the enhancement should operate retrospectively from the date of the bond. In the former case the contract is held to be enforceable, while in the latter the provision for enhanced interest is viewed as being in the

nature of a penalty which the courts are not bound to enforce. This distinction, however, has been denied in some cases and the contract has been enforced even when the enhancement was retrospective. The weight of authority, however, may be said to be in favour of the maintenance of the distinction. Under the law, as it stands, a debtor is held bound by his contract to pay interest, however high, at the rate agreed upon, except in cases in which a higher rate of interest is stipulated for from the date of the bond on the happening of default. The remedy applied by the old usury laws was to prescribe a maximum rate of interest and provide that where parties have agreed to pay interest above the prescribed rate, the excess shall not be recovered. But the disadvantages attaching to the remedy were so serious and the remedy was so inefficacious, that it had to be abandoned. Usury laws prevented open, straightforward dealings between debtors and creditors and necessitated recourse to methods of evasion. Under such laws the debtor found it more difficult to raise loans and had to submit to harder terms in regard to interest in order to induce the creditor to run the risk of underhand transactions. The ordinary effects of usury laws were to increase the disadvantages of the class for whose protection they were passed and to check the growth of industry. The mischief caused by the latter effect is most pronounced in progressive communities in which the operations of industry are carried on largely with the help of borrowed capital.

Another remedy which has been suggested is to invest the courts with a discretion to reduce the contract rate of interest whenever they find it unconscionable. Such a course is open to all the evils which attend on usury laws and to other evils in addition. It introduces uncertainty and want of uniformity into the administration of justice and renders it utterly impossible for parties to calculate before hand the extent of their rights or obligations. No two courts are likely to take the same view as to what is a fair rate of interest under the circumstances of the case. The rate of interest depends on numerous circumstances of all of which it is impossible that a court can take account, and the process of substituting the judgment of the court for that of the parties formed at the time of the contract, is based on the assumption found to be generally unwarranted by experience, that the courts have got better means and ability to judge of the interests of parties than

the parties themselves. The debtor's sense of obligation is impaired by the encouragement of the notion that by an appeal *ad miseri cordiam* he can order the court to get behind his contract and relieve him from the consequences of his promise. The remedy will be found to be a greater evil to society than the disease.

The remedy applied by the old Hindu law-givers was something entirely different and was almost entirely free from the objections to which usury laws are open. The provision of the Hindu Law was that when the interest on a debt was equal to the amount of the principal, interest should cease to run. This principle of Hindu Law has been applied as between Hindus by the Calcutta High Court on the Original Side and by the Bombay High Court.

As pointed out by the courts, this rule is not inconsistent with the Act repealing the usury laws and is merely a rule of limitation. The rule does not interefere with the rate of interest, but only with the time up to which it shall run. This period will be long or short, according as the rate of interest is low or high. When parties agree to pay high rates of interest, they generally intend that the loan should be of short duration and expect to be in possession of the means to pay the debt at the end of the period. For a loan of longer duration, the debtor would not agree to pay such a high rate of interest and the creditor would be content to take a lower rate of interest, seeing that he is relieved of the trouble of finding other investments for his money during this period. The hardship of the present law consists in the application of the higher rate of interest which was contemplated only in reference to a short period, to a long period after default. The rule of Damdupat is thus calculated to produce the necessary adjustment between the period of loan and the rate of interest. If any form of legislation against usury is permissible, the rule of Damdupat which places a time limitation upon interest is the mildest. While the rule is likely to commend itself to the Hindus to whom it is part of their ancient law, it will also commend itself to the Mohammedans who are prohibited by the Koran from taking interest. If the Bill now brought forward is open to objection, it is not on the ground of any conflict with any rules of Hindu or Mohammedan Law, but on grounds of general expediency. The question which has to be considered is whether the rule of Damdupat is likely to cause any injustice to the creditor, or any benefit or disadvantage to the

debtor. So far as the creditor is concerned, he can effectually protect his interests by bringing a suit when the interest is about to cease to run. It is the debtor's position that is likely to be affected by the provisions of the Bill. The debtor will be pressed for payment at the time that the interest would cease to run and he will have to submit to one of three courses. He must either find the money to pay the debt, or submit to be sued, or renew the bond if the creditor consents to it. If the debtor has got the money to pay the debt, he can of course discharge it at once and suffer no inconvenience; but if he has to raise the money elsewhere, the chances are that the pressure of his creditor's demand may drive him to borrow money on terms probably more onerous than those on which the prior loan was taken. If, on the other hand, the debtor is neither in possession of the necessary funds himself, nor is able to raise it from others, the adoption of the other alternatives by the creditor inevitably tends to place the debtor in a position of serious disadvantage. In the event of a suit, the costs will be added to the amount of his liability, and his credit, if any, is impaired, and he will be compelled to raise money on onerous terms under pressure of execution. If, however, the creditor consents to a renewal of the bond, the accumalated arrears of interest will be added to the principal and the whole amount will be treated as the principal of the new bond and the debtor will have to pay interest on the arrears of interest which have become merged in the principal of the new bond. Whichever of these various courses is adopted by the debtor, the probabilities are that he will find himself in a more disadvantageous position than before. Under the law as it stands, any one of these courses can be adopted by the debtor. If he has got money to pay his debt, there is nothing to prevent him from doing so. If he has not got the money, he can obtain from the creditor an extension of time on the old terms, but under the proposed measure he will be driven to raise money just at the time when he is in want of it, or renew the bond and virtually pay compound interest. It is said that the present law enables the creditor to play the waiting game and crush his debtor under an accumulating load of interest. But it is forgotten that there is nothing to compel a debtor to submit to be the victim of such a game except his inability to pay. It is difficult to see how a person who is unable to pay his debt can be placed in a better position by forc-

ing the creditor to press for payment. The only cases in which the proposed measure can possibly have any beneficial effect are those in which the debtor, having the present ability to pay or find means of payment, is unmindful of his interests and sleeps over his obligation and requires to be awakened by a sharp demand to induce him to make the necessary arrangement for the liquidation of the debt. In such cases, it is lack of inclination on the part of the debtor and not of ability that allows the debt to grow; but such cases are extremely rare and we do not think it would be desirable or expedient to undertake legislation for the benefit of such a small class when it is likely to have a prejudicial effect upon the vast majority of borrowers in the country. Another anomalous result of this legislation will be that the honest debtor who has been paying interest on his debt regularly till he finds himself in difficulties is placed in a much worse position than the debtor who has failed to pay a single pie towards interest on his debt from the very beginning. Such a result is as unjust as it is anomalous. The anomaly may of course be avoided by providing that in the application of the rule, interest already paid should be taken into account, but such a provision will be unjust to the creditor even in cases in which the rate of interest charged is fair and moderate. The rate of interest might be as low as four or five per cent. and yet if the term fixed in the bond is long and if the interest remains unpaid for a long time, it may exceed the principal. There is no principle of justice or equity which can induce us to say that the creditor who has been kept out of his money for such a long period is disentitled to interest in excess of the principal or that the debtor need not pay for the use of the money by which he has benefitted. It appears to us that while the benefits expected to result from the measure are extremely small and problematical, they are far out-weighed by the evils which are likely to follow.

INDIAN CASE LAW IN 1895—II.

In this article we resume our retrospect of the Indian cases for 1895. The rulings under the Transfer of Property Act IV of 1882 may now be noticed.

Section 43 which relates to transfers by unauthorised persons who subsequently acquire an interest in the property transferred,

has been interpreted by the Madras High Court so as to considerably advance the remedies which that section affords to transferees. The section enunciates the equitable principle that the transferee shall be entitled to compel the transferor to make good his representations, if, subsequently to the transfer, he is in a position to do so; and this right may be exercised by the transferee "at any time during which the contract of transfer subsists." The same principle underlies the provisions of S. 18 of the Specific Relief Act I of 1877. The question is whether S. 43 can be applied to a state of things in which the contract of transfer has become merged in a decree and the acquisition of interest by the transferee takes place after the passing and before the satisfaction of the decree. The Court answered the question in the affirmative and allowed the decree-holder to proceed in execution against the judgment-debtor's interests as enlarged subsequent to the date of the decree—*Ajijuddin Sahib* v. *Sheik Budan Sahib*, I. L. R., 18 M, 492. *Best* J. observed. "The words of S. 43 of the Transfer of Property Act "at any time during which the contract of transfer subsists" are in my opinion wide enough to cover the present case; the contract has no doubt merged in the decree; but it must be held to subsist all the same, till the mortgage is satisfied and the mere fact of the share in question having devolved on respondent subsequent to the decree, appears to me to be no reason for holding S. 43 of the Transfer of Property Act to be inapplicable."

The decision in *Gunga Narain Gope* v. *Kali Churn Goala*, I.L.R., 22 C, 179 clears up a misconception that may generally be said to exist as regards delivery of possession accompanying an unregistered sale deed for less than Rs. 100 consideration. Section 54 of the Transfer of Property Act requires registration in the case of *all* sale deeds whether the consideration is Rs. 100 or less.—see *Makhan Lal Pal* v. *Banku Behari Ghose* I. L. R., 19 C, 623 (F. B.) &c. It is also settled law that an oral sale for less than Rs. 100, accompanied by delivery of possession is valid so as to confer a good title upon the purchaser. Is an unregistered sale deed for less than Rs. 100, accompanied by delivery of possession of the property sold, good and valid in law? The decision under notice answers in favor of the validity of such a sale. *Beverley J.* said "What S. 54 says and what the Full Bench case *Makhan Lal* v. *Banku Behari* I. L. R., 19 C, 623 says, is that where the transfer is effected by means of an

instrument *without delivery of possession*, in *that* case the instrument must be registered, or the transfer is invalid." Delivery of the property sold in the case of tangible immoveable property of less than Rs. 100 value does not become less effective for purposes of transferring ownership simply because the delivery accompanies an unregistered sale deed instead of an oral sale. Justice *Trevelyan* said in the Letters Patent Appeal "If there were no deed of sale the case would be a clear one. As the law stands, the deed of sale has *no operation to transfer the property*; though it may show the payment or promise of a price which *plus* the transfer of ownership constitutes a sale."

Of the several sections in the Transfer of Property Act which are characterized by bad drafting, S. 135 is one that is perhaps more conspicuous in this respect than others. The Bombay High Court maintains in concurrence with the Calcutta High Court *Grish Chandra* v. *Kashisauri Debi* I. L. R., 13 C, 145; *Khoshdeb Biswas* v. *Satar Mondol* I. L. R., 15 C, 436, that notwithstanding an assignment for a smaller amount made before the institution of any suit upon an actionable claim, the assignee is entitled to recover the whole amount of the debt.—*Vishnu* v. *Dagadu*, I.L.R., 19 B. 290. The other High Courts have upheld the contrary view. It is a pity that S. 135 should by its defective drafting, have led to a serious difference of views as to its interpretation. The evil calls for the early interposition of the Legislature.

The Allahabad High Court still resolutely adheres to its view that the failure to comply with the provisions of S. 85 of the Transfer of Property Act as regards joinder of parties is an illegality and will even avoid a mortgage decree from taking effect against the sons of a Hindu father, in case the sons were not made parties to the decree even though on the merits the sons have no case.—See *Bhawani Prasad* v. *Kallu*, I. L. R., 17 A 537 (F. B.) In fact the Allahabad High Court has allowed its own view of S. 85, to virtually repeal the Hindu Law relating to the son's liability for the father's debts, as laid down by the Privy Council in an unbroken series of decisions beginning with *Gridharee Lal* v. *Khantoo Lal*, 1 I. A., 32. We have on a former occasion (see 4 M. L. J., 266.) pointed out the unsoundness of this view and tried to show that non-joinder is at best an irregularity not vitiating the decree already obtained. Such a decree will not however bind those who are not parties

to it and will not affect their rights. To give greater effect to the omission to implead, is unsound in principle and unwarranted by the authorities. S. 85 also requires very early revision at the hands of the Legislative draftsmen.

There is discernible a growing tendency to apply the provisions of S. 99 to cases which may not appear to fall clearly within the scope of that section. After the Transfer of Property Act came into force, a mortgagee obtained a decree upon a mortgage bond. The procedure prescribed by the Transfer of Property Act was not followed and the suit was not expressly brought under S. 67 of the Act. It was held that the decree-holder could not bring the property to sale by reason of the prohibition contained in S. 99.—See *Chundra Nath Dey* v. *Burroda Shoondury Ghose*, I. L. R., 22 C. 813. Again the prohibition contained in S. 99 was applied to the case of a charge on specified immoveable properties created by a *consent decree* and it was held that the properties cannot be sold in execution of the decree and that a separate suit must be brought under S. 67 to enforce the said charge—*Aubhoyessury Dabee* v. *Gouri Sankar Panday*, I. L. R., 22 C, 859. Again, the same view was affirmed with respect to a charge for maintenance created by a decree—See *Matangini Dassee* v. *Chooneymoney Dassee*, I. L. R., 22 C. 903. It is doubtful whether the scope of S. 99 is wide enough to cover the above cases.—See clause *d* of S. 2 and the preamble to the Act.

The question whether in India privity of contract can be held to continue after the privity of estate has ceased, came up for decision in *Sasi Bhushan Raha* v. *Tara Lal*, I. L. R., 22 C. 494. The suit was for rent by a lessor against both the lessee and the lessee's transferee. The Court was inclined to the view that the privity of contract will not cease, because there has subsequently been a transfer of the estate; and that both the defendants will be liable to the plaintiff, the lessee by reason of the privity of contract and the lessee's transferee by reason of the privity of estate. A decision to the same effect by Justice *Muthusami Aiyar* is reported in *Velu Pillai* v. *Ghouse Mahomed* I. L. R., 17 M, 294.

The question, whether non-contractual *post diem* interest awarded in the case of a mortgage deed constitutes a charge upon immoveable property or not, appears to remain unsettled still. The

Madras High Court, after a conflict of decisions, appears to be in favour of the view that the interest so awarded does not constitute a charge.—See *Thayar Ammal* v. *Lakshmi Ammal,* I. L. R., 18 M, 331. The same view appears to prevail in Allahabad, *Narindra Bahadur Pal* v. *Khadim Husain* I. L. R., 17 A, 581 F. B. In Calcutta also, the tendency is in the same direction though there also, a conflict appears to exist as in Madras—See *Bikramjit Tewari* v. *Durga Dyal Tewari* I. L. R., 21 C, 274, *Gudri Koer* v. *Bhubaneswari Coomar Singh* I. L. R., 19 C, 19.

We may next notice one or two rulings that bear upon the Specific Relief Act I of 1877. There appears to exist a difference of opinion whether the rule of English Law that specific performance of a contract cannot be decreed against an infant is applicable to India or not. In *Jugul Kishori* v. *Anunda Lal* I. L R., 22 C, 545 which was a suit for specific performance of a contract entered into by a Hindu minor through his guardian, the Court applied the English rule and dismissed the suit. The Court observed "We know of no case in which a decree for specific performance has been made against an infant. In *Flight* v. *Bolland* (4 Russ. 298), it was held that an infant could not maintain a suit for specific performance of a contract, the remedy not being mutual and it being a general principle of courts of equity to interfere only when the remedy is mutual." "A guardian has under the Hindu Law a qualified power of dealing with the property of an infant under his charge. He can, in case of necessity, sell, charge or let it for a long term. But the infant is not absolutely bound by the act of the guardian; he could on attaining majority, recover the property if it had been disposed of without legal necessity." "A contract so long as it is voidable cannot be specifically enforced, and an infant cannot ratify so as to be bound by the ratification." The opposite view in favour of decreeing specific performance, provided the contract is for the benefit of the infant, has been maintained by the Madras High Court and the English rule has been held inapplicable to this counrty—*Krishnasami* v *Sundrappier* I. L. R., 18 M, 415.

In *Venkatesa Tawker* v. *Ramasami Chettiar* I. L. R., 18 M, p. 338, the Court had occasion to point out that it is a mistake to suppose that injunction can be issued to the courts themselves

with respect to the proceedings before such courts. "It is, however, as well to notice here that the injunctions issued by the Court of Chancery in England for controlling proceedings in other suits are not orders issued to such other courts but to the party, such party being amenable to the jurisdiction of the court granting the injunction and capable of being acted on by the process of contempt of court, and they are in fact orders *in personam.*" The case of *Corkhill,* I. L. R., 22 C, 717 affords an instance in which the authority of the High Court was invoked in connection with a municipal election, under S. 45 of the Specific Relief Act. In that case it was held that the High Court has jurisdiction by a proceeding in the nature of a *quo warranto,* to restrain a person who has not been duly elected from exercising the functions of a duly elected commissioner; and that the validity of the election is for that purpose subject to the adjudication of the High Court.

The decisions under the Penal Code point to an advance in the Criminal Case-law of India. They appear to be more in harmony with advanced notions of morality. In *Queen Empress* v. *Kellie* I. L. R., 17 A, 153, it was held that whatever may be the law in England, still under the Indian Law an accused person may be charged and convicted for criminal breach of trust under S. 409 of the Indian Penal Code on mere *general deficiency* in the account. It is not necessary to charge the accused with the embezzlement of a particular sum received on a certain date from some particular person. Compare the decision in *Queen Empress* v. *Ramchandra Govind Harshee* I. L. R., 19 B, 749. Again the view that the fabrication of a document to conceal a *contemporaneous* or *past* embezzlement does constitute the offence of forgery, has been held in *Lolit Mohan Sarkar* v. *Queen Empress,* I. L. R., 22 C, 313. The same view prevails in Madras and Bombay, *Queen Empress* v. *Sabapati* I. L. R., 11 M, 411; *Queen Empress* v. *Ganesh Khanderao* I. L. R., 13 B, 515. The Allahabad High Court alone maintains the opposite view *Queen Empress* v. *Gridharee Lal* I. L. R., 8 A, 653.

The decision of the Calcutta High Court in *The Deputy Legal Remembrancer* v. *Karuna Baistobi,* I. L. R., 22 C, 164 is very important and calls for more than a passing notice. It effectively stigmatises as criminal the practice of prostitutes purchasing the veriest infants for carrying out at an *indefinite distant* period of time, thei

immoral objects. In this case a prostitute purchased two girl infants each about a year old; she was charged under S. 373 of the Indian Penal Code with buying minor girls for purposes of prostitution. On appeal to the High Court against her acquittal by the Sessions Judge, it was held that in order to constitute an offence under S. 373, it is not necessary that there should be a guilty intention of misusing the minor either immediately or at least at a definite, though remote, future period. The offence will be complete as soon as a girl is purchased with the guilty intention or knowledge of likelihood that she shall, while still a minor under the age of 16 years, be employed for purposes of prostitution, although the point of time for such employment may be remote by reason of her physical incapacity for the purpose. "We are quite free to own that apart from the evidence the presumption must always be in favor of innocence . . . . . . Illustration (*a*) to S. 106 of the Indian Evidence Act has an important bearing upon the question we are considering. . . . If the intention was something other than that which the character and circumstances of the act suggest, it was for the accused to have shown that. A further argument was raised that although all this may go to show that the intention was that the girls should be employed for the purpose of prostitution, still they did not sufficiently show that the employment intended was to be before the completion of the 16th year by the girls. Here, again, the provisions of the Evidence Act referred to above would show that it was for the accused to prove that she intended to put off the employment until the completion of the 16th year. The age of maturity for the purpose of prostitution is attained before the completion of the 16th year and there is nothing shown why it should be held that though the intention was that the girls should be employed for the purposes of prostitution, the intention was nevertheless qualified to the extent that the employment was not to take place until the 16th year was completed." The case at *Queen-Empress* v. *Javecharam*, I.L.R., 19 B, 363, is noteworthy for the distinction it points out between a spy and an accomplice. A spy is one who knowing of criminal doings or doings which will culminate in crime, merely pretends to concur with the perpetrators. The spy acts thus with a view to bring the offenders afterwards to justice. This conduct is not improper. But if a person acting as a spy suggests and initiates an offence, he himself

is guilty as an accomplice. Mere good intention does not ordinarily excuse a criminal act.

There are a few rulings under the Criminal Procedure Code that call for some notice. It is a wholesome principle of law that the Magistracy and the Executive should try as far as possible to carry out the mandates of the Judiciary. This was pointed out in the case *In re Rahmat Ullah*, I. L. R, 17 A, 485 where a Full Bench of the Allahabad High Court has held that a District Magistrate has no power either under S. 14 of the Criminal Procedure Code or in his executive capacity, to make any orders which would have the direct effect of interfering with the execution of a civil court's decree Notwithstanding the decisions in *Agra Bank* v. *Leishman*, I. L. R., 18 M, 41, *Bechu Sheikh* v. *Deb Kumari Dasi*, I. L, R., 21 C, 404, *In re Jai Lal*, I. L. R., 13 A, 362; *In re Huchapa*, I. L. R., 15 B, 152, the question as to the exact point of time with reference to which an enquiry under S. 145 of the Criminal Procedure Code must be directed, does not appear to be still settled, *Katras-Jherriah Coal Company* v. *Sibkrishto Daw & Company*, I. L. R., 22 C, 297. In this case the Court observed that to hold that the Magistrate is precluded from enquiring into anything before the institution of the proceedings might in some cases lead to injustice. The case of *Chandi Pershad* v. *Abdur Rahman* I. L. R., 22 C, 131, points to an advance in the law relating to revision by High Courts in criminal matters. The powers of revision have sometimes been considered as exercisable only over proceedings not interlocutory or not pending at the time of revision. In the above case it has, however, been laid down that the High Court has power to interfere by way of revision with interlocutory orders at any stage of a case, no matter, whether the case has been disposed of by the lower courts or is still pending before them.

Basumati Adhikarini v. *Budram Kolita*, I. L. R., 22 C, 46 and *Lalji Shamji* v. *Walji Wardhman*, I. L. R., 19 B. 507 relate to the determination of caste questions and caste jurisdiction. These cases indicate that a change of spirit has come over the people of this country with respect to their social sentiments. They show that attempts are here and there made to shake caste authority and assert individual rights and individual interests.

The question whether a ryot has a *locus standi* in a Civil Court to object to the grant of waste lands by Government in violation of their own *dharkhast* rules was answered in the negative by the Madras High Court in *Periaroyalu Reddi* v. *Royalu Reddi*, I. L. R., 18 M, 434. "Dharkhast rules are departmental and if they are infringed, the remedy for such infringement is also departmental. Irregularities in observing those rules constitute no valid ground of interference by the Civil Courts with a grant of land by the Government."

The case *Hari Krishna Joshi* v. *Shankar Vithal*, I. L. R., 19 B, 420 raises a very interesting question of acquisition of an easement by prescription with respect to growing trees overhanging a neighbour's land. The Court following the decision in *Lemmon* v. *Webb*, 1894, 3 Ch. 1, held that a prescriptive right cannot be acquired with reference to *growing* trees overhanging another's land whatever may be the length of time during which the overhanging of the trees may have continued. A growing tree being always in a state of change materially differs from such things as eaves and projecting beams. The tree always changing in extent and position of space, the convenience to the owner of the tree cannot become so determined that it can by any length of time be held to be enjoyed as "of right" as required by S. 15 of the Indian Easements Act V of 1882.

The decision of the Madras High Court in *Alagappa Chetti* v. *Vellian Chetti*, I. L. R., 18 M, 33 applies to suits in assertion of the rights of a joint Hindu family, the principle applicable to suits by joint-contractors. Accordingly, a suit by the managers of an undivided Hindu family was held to be unsustainable in law in the absence of the other members as parties to the suit. It has been held in several cases that decrees obtained against the manager of a Hindu family are binding upon the other members.—See *Doulut Ram* v. *Mehr Chand* 14 I. A., 187; *Bhagbut Pershad* v. *Girja Koer*, I. L. R., 15 C, 717; Bom. P. J. 1889, page 248; If for purposes of liability, the manager represents others, why should he not be allowed to do the same for purposesof asserting as plaintiff the rights of the family. In many cases, a joint Hindu family has been treated as in the nature of a judicial person, with its manager to represent it in all transactions including judicial proceedings. The decision

under notice has to be carefully scrutinized before it can be accepted as sound. A very recent decision of the Bombay High Court *Hari Vasudev Kamat* v. *Villahadu Dad Gavda*, I.L.R., 20 B, 435 upholds the views herein submitted.

We shall next notice a few rulings under the Indian Limitation Act. The question, whether the case of money deposited with a banker on the terms that the money should be repaid with interest on demand, falls under art 60 or art 59 of the Limitation Act, may perhaps be considered to have become almost settled, see *Perundevi Tayar* v. *Nammalvar Chetti*. I. L. R., 18 M, 390; *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi*, I. L. R., 16 C. 25. The decision of the Bombay High Court in *Ichhi Danji* v. *Nathu* I. L. R., 13 B, 338 that it is a case of money lent (art 59) and not a case of deposit (art 60) is opposed to the more recent rulings in *Dorabji* v. *Muncherji*, I. L. R., 19 B, 352; *Muncherji* v. *Dorabji*, I. L. R., 19 B, 775. In the latter case it was pointed out that a deposit is a loan and something more, in that the depositee stands in a fiduciary position to the depositor.

The cases *Dwarka Nath Misser* v. *Barinda Nath Misser*, I.L.R., 22 C, 425 and *Tiluck Singh* v. *Parsotein Proshad*, I. L. R., 22 C, 924 illustrate the attempts very often made by litigants to get rid of their adversaries by invoking the aid of the law of Limitation in the matter of each and every application made to a court. An application under the Transfer of Property Act for an order absolute with respect to the sale of mortgaged property, *Tiluck Singh* v. *Parsotein Proshad*, and an application to effect partition by metes and bounds in pursuance of a decree for partition *Sasi Bhushan* v. *Tara Lal*, I. L. R., 22 C, 495 were both held not to fall within the scope of the Limitation Act.

In *Narayanasami Gramani* v. *Periathambi Gramani* I. L. R., 18 M, 460, it was held that the devise of one cawny out of a land measuring 1¾ cawnies is good at law and that the devisee was entitled to select any one cawny out of the land in question. An argument at the bar that the devise was indefinite and vague and hence invalid did not find favour with the Court.

The Privy Council decision in *Gurdyal Singh* v. *Raja of Faridkot*, I. L. R., 22 C, 222 contains the most lucid exposition of a very interesting question of Private International Law. The question related to the international validity of a decree *in absentum* passed

by a court of a foreign state in a personal action brought against a foreigner. We may collect the following doctrines of International Law from the judgment of their Lordships.

1. All jurisdiction is primarily territorial. It exists always as to land within the territory and it may be exercised over moveables within the territory; and in questions of status or succession governed by domicile it may exist as to persons domiciled, or who when living were domiciled within the territory.

2. Territorial jurisdiction attaches (with special exceptions) upon all foreigners either permanently or temporarily resident within the territory, while they are within it.

3. But territorial jurisdiction does not follow the foreigners after they have withdrawn from a state and when they are living in another independent country. And no territorial legislation can give jurisdiction which any foreign court ought to recognise, against foreigners who owe no allegiance or obedience to the power which so legislates.

4. Even courts of the country in which the cause of action arose, or in cases of contract, the courts of the *locus solutionis* or the place of performance cannot according to the principles of Private International Law assume jurisdiction over a defendant not otherwise subject to such Courts. In such cases as well as all others where the action is personal, the Courts of the country in which the defendant resides have alone power and these Courts ought to be resorted to, to do justice.

5. It follows from the above doctrines, that a decree pronounced in a personal action *in absentem* by a Foreign Court to the jurisdiction of which the defendant has not in any way submitted himself, is by International Law, an absolute nullity.

The decree in question being like the one spoken of above in clause 5, the Privy Council pronounced it to be invalid in reversal of the views of the Courts below.

M. K. VAIDYANATHA AIYAR.

NOTES OF INDIAN CASES.

Dinshaw Nowroji Bodi v. Nowroji Nasurwanji Bodi, I. L. R., 20 B 46. This is a somewhat novel case. A suit was brought

by a trustee of a charitable trust for sanction of a proposed mortgage to raise money for the trust purpose. The Indian Trusts Act S. 34 does not apply as the Act has no connection with religious or charitable trusts. No question appears to have been raised as to the maintainability of such a suit. Such suits are common enough in England under special enactments and they would lie in the High Courts as they have inherited the jurisdiction of the Supreme Courts. It seems to us, however, that the Courts in India being Courts of Equity as well as of law, the jurisdiction of the Court of Chancery belongs to the Civil Courts in the Moffusil.

Bai Barji v. **Bai Santok,** I. L. R., 20 B 53. We have more than once had occasion to draw attention to the rule of law as to the burden of proving special customs as regards particular communities in India and the quantum of proof necessary to establish them. It seems to us that *Ranade and Fulton J. J.* lay down the right principle when they say. "If the evidence is clear on the point of the general prevalence of the Hindu rules of succession in preference to the rules of Mohammedan Law the burden of proof will be discharged, and it will be for the appellant to show that the particular relationship was excluded from the sphere of the proved general usage of the community."

Vira Sungappa Chetti v. **Rudrappa Chetti,** I. L. R., 19 M 110. The ruling of *Subrahmania Aiyar and Best J.J.* in this case that the mother and daughter created a joint-tenancy between them with the right of survivorship in case of the death of either of the owners, must, we apprehend, be held to be incorrect, having reference to the decision of the Privy Council in *Jogeshwar Narain Deo* v. *Ramchandra Dutt,* I.L.R., 23 C 670 decided in February 1896. *Lord Watson* delivering the judgment of the Judicial Committee observed that except in the case of coparcenary between the members of an undivided family, the principle of joint-tenancy is unknown in the Hindu Law. The case decides another important point that in the case of *stridhanam* property inherited by a Hindu female, the inheritor takes only a life estate, and on her death the heirs of the last holder succeed to the property. There has been some conflict of judicial opinion in Madras on the point, but on the whole the judgment seems to be satisfactory.

Kamalakshi v. **Ramasami Chetti,** I. L. R., 19 M, 127. It is not an irremediable defect that a minor plaintiff sues in his own name instead of by a next friend. The defendant, therefore, can waive the objection by not taking it in due time. The rule is well established in England though there are very few Indian authorities on the point. *Mr Justice Subrahmania Aiyar's* judgment as to the validity of the adoption of a dancing girl under the age of sixteen is very instructive. If

such an adoption be made with the intention that the adopted girl should in due course embrace the life of a prostitute, the act would be criminal under S. 373 of the Indian Penal Code. Can it then confer any civil right on the girl adopted, seeing that the girl herself was no party to the crime. The question is novel and not free from difficulty but we are not dissatisfied with the decision of the learned judge that the sounder position would be to hold, that no civil rights can accrue from a criminal act, even in favour of one not a party to the crime. The Court was pressed to hold that since in most cases the adoption of dancing girls is made with the view that the adoptee should follow the profession of the adoptor, such adoption must necessarily be invalid; but the argument did not prevail; for the learned Judges held that the immoral intention did not necessarily exist in all such cases, and that a girl might be adopted merely for the sake of an heir. We doubt whether the Court was right in the view it took. In deciding whether a transaction should be condemned as immoral or opposed to public policy, we think it is hardly necessary to prove that the immorality must necessarily exist. If the probable consequence would be to make the girl lead an immoral life, as it, certainly, would be in all cases of such adoptions, the adoption might be regarded as immoral.

SUMMARY OF RECENT CASES.

Indemnity—Estoppel—Abandonment.

Chadwick v. Hon. Sir William M. Manning. [1896, A. C. 231.]

Where a person possesses a legal right, a Court of Equity will not interfere to restrain him from enforcing it, though, between the time of its creation and that of his attempt to enforce it, he has made representations of his intention to abandon it. Nor will Equity interfere, even though the parties to whom these representations were made have acted on them, and have, in full belief in them, entered into irrevocable engagements. To raise an Equity in such a case, there must be a misrepresentation of existing facts and not of mere intention. (*Jordon and Wife* v. *Money* 5. H. L. C, 185.)

The plaintiff and the defendant had jointly guaranteed to a bank the payment of a cash bond, and the plaintiff had agreed to indemnify the defendant from all liability thereunder. Seven years after, under certain arrangements with the principal debtor, the bank released the guarantors from all liability on payment by each of £ 1,000. In the interval between these two periods the defendant forgot everything about the indemnity and whenever the bank pressed him for payment he

wrote to the plaintiff to put pressure upon the principal debtor, and finally with the knowledge and assent of the plaintiff entered into those arrangements with the bank, by which they discharged the guarantors on payment of £1,000 each. In all this he wrote and acted just as if the agreement of indemnity were not in existence or as if it had completely vanished from his mind. Shortly afterwards he recollected the indemnity and called on the plaintiff to indemnify him and on his refusing to do so filed an action at law. The plaintiff, then, filed a statement of claim in Equity, asking for a declaration that the indemnity had been discharged and that the defendant was estopped.

Held by the Privy Council that the indemnity was not discharged and that the defendant was not estopped.

Arbitration—Award—Unanimity among the arbitrators.

United Kingdom Mutual Steamship Assurance Association v. Houston & Co., [1896 I. Q. B. 567 per Mathew, J.]

Where parties agree to refer matters in dispute to a number of arbitrators without providing for cases of disagreement among them, the general rule is that all the arbitrators appointed should concur in the award. An award made by a majority of them alone is bad.

Practice—Summons—Misdescription.

Smith v. Hammond, [1896 I. Q. B. 571 per Pollock, B. and Bruce, J.]

When a summons to a defendant has been served upon the proper person, a mistake in the description of the defendant does not vitiate the summons unless he has been misled or prejudiced. The defendant had been described in the writ as of Lytham in the County of Lancaster whereas his only residence and place of business was at Londonderry in Ireland. Having been served with this writ he applied to have it set aside. Held that the summons was good and that the incorrect statement of the defendant's address did not vitiate it.

Penalty—Liquidated damages.

Willison and another v. Love and others. [1891 1 Q. B. 626 C. A.]

The general rule ought to be that parties must be left to the consequences of their own acts, and their agreements entered into by them with their eyes open should be strictly enforced unless the case falls within the provisions of Ch. II of the Contract Act. The English law has

deviated from this rule in making a distinction between penalty and liquidated damages and has made it a matter of no small difficulty for judges to decide in any particular case what is penalty and what is liquidated damages. A lease of a farm contained a covenant by the lessees not to sell hay or straw off the premises, during the last twelve months of the tenancy, but to consume the same upon the premises and provided that an additional rent of £ 3 per ton should be payable by way of penalty for every ton of hay or straw so sold. It appeared that the market manurial value of hay was from 15 *s.* to 1£ per ton. The Court of Appeal held that the sum made payable was penalty and not liquidated damages. They laid down that 'where a sum is made payable by a contract to secure performance of several stipulations, the damages for the breach of which, respectively, must be substantially different or, in other words, the performance of stipulations of varying degrees of importance, that sum is *prima facie* to be regarded as a penalty and not as liquidated damages".

Rigby, L. J., who took part in the case regretted that judges should have deviated from the general rule at all, and delivered himself thus:—"The history of the decisions appears to me to lead to the conclusion that the Courts made a mistake when they departed in regard to these cases from the general rule that effect ought to be given to the terms of the agreement entered into by the parties, and that, when once that rule was departed from, it became extremely difficult to arrive at any clear rule on the subject. If I had had to decide this case independently, I might, perhaps, have come to a conclusion different from that at which Collins J. at the trial and the Master of the Rolls and my brother A. L. Smith in this Court, have arrived; but I cannot say that I have been able, as the result of the authorities to which we have been referred, to grasp any general principle with sufficient clearness to enable me to give a judgment differing from that of the learned judge below and the other members of the Court."

For the law in India *vide* S. 74 Indian Contract Act.

Trade mark—Trade name—Rival makers—Injunction.

Powell *v.* Birmingham Vinegar Brewery Co. [1896 II Ch. 54 C. A.]

The case of Reddaway, v. *Banham* recently decided by the House of Lords [1896 A. C. 199,] has been followed by the Court of Appeal in this case. The facts of both the cases are identical *i.e.* that the words used to denote the plaintiff's article—whether originally

descriptive or otherwise--had come to mean in the market the article made by the plaintiff that the defendant's article was being mistaken in the market by ordinary *unwary* purchasers for plaintiff's article and bought by them as such. In the present case, however, the defendant had tried to remove such confusion on the part of purchasers by putting his own name on the label and introducing some other differences in the discription But the differences between the bottles of the plaintiff and of the defendant are not sufficient to prevent mistakes. The Court of Appeal held following *Reddaway* v. *Banham* that the plaintiff was entitled to an injunction restraining the defendant from selling his article by the name by which plaintiff's article was known in the market without better distinguishing it from that of the plaintiff.

The principle on which Courts act in determining the right of rival manufacturers with reference to the use of trade marks and trade names is stated and elaborately explained in the judgments of their Lordships. The judgment of *Lindley*, L. J., is very elaborate and exhaustive and will well repay a perusal.

Kay L. J. has in his judgment stated the law relating to this subject in the form of a few propositions.

(1) "It is unlawful for a trader to pass off his goods as the goods of another.

(2) Even if this is done innocently it will be restrained. *Millington* v. *Fox* 3 My. & Cr. 338.

(3) *A fortiori*, if done designedly, for that is a fraud.

(4) Although the first purchaser is not deceived, nevertheless, if the article is so delivered to him as to be calculated to deceive a purchaser from him, that is illegal. *Sykes* v. *Sykes*. 3 B. & C. 541.

(5) One apparent exception is, that where a man has been describing his goods by his own name, another man having the same name cannot be prevented from using it, though this may have the effect of deceiving purchasers *Burgess* v *Burgess*, 3. D. M. & G. 896. *Turton* v. *Turton*, 42 Ch. D. 128.

(6) But this exception does not go far. A man may so use his own name as to infringe the rule of law. "It is a question of evidence in each case whether there is a false representation or not"; per *Turner* L. J. in *Burgess* v. *Burgess*. 3 D. M. & G. 905.

So he may be restrained if he associates another man with him so that under their joint names he may pass off goods as the goods of another person *Croft* v. *Day* 7 Beav. 84. *Clayton* v. *Day*. 1 5 Sol. J. 43.

(3) *Mellachirno* Egyptian Cigarette Co., 4 Rep. Pat. Cas. 215.

(7) Another apparent exception is, where a man has under patent had a monopoly for fourteen years, and has given the article a descriptive name, he cannot when the patent has expired prevent another from selling it under that name: *Young* v. *Macrae* 9 Jur. (N.S.) 322. *Linoleum Manufacturing Co v. Nairn.* 7 Ch. D. 834.

(8) I am not sure this would be so, if the name so used were the name of the patentee, or even a purely fanciful name not descriptive.

(9) Certainly, where there has not been a patent, and an article has been made and sold under a fanciful name not descriptive, so that the article as made by one person has acquired reputation under that name, another trader will not be permitted to use the name for a similar article made by him! *Braham* v. *Bustard,* 1 H. & M. 447. *Cochrane* v. *Macnish and Son,* [1896] A. C. 225.

(10) To this last proposition there is again a limitation. If the first maker has slept upon his rights, and allowed the name to be used by others until it has become *publici Juris,* the Court will not interfere.

Detinue—Property by finding—Treasure trove.

South Staffordshire Water Company *v.* Sharman, [1896, II., Q. B., p. 44. per Ld. Russell of Killowen, C. J.]

The action was brought in detinue to recover two gold rings from the defendant. The defendant was employed by the plaintiff in the clearing of a pool in a certain land of which he was in possession as owner in fee simple. While clearing the pool, defendant discovered the rings and refused to give them to the plaintiff and denied his title to recover them. Ld. Russell of Killowen, C. J , decreed the suit and hold that where a person has possession of land or house, with a manifest intention to exercise control over it and the things which may be in or upon it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locas in quo.*

The case of *Bridges* v. *Hawkesworth* (21., L.J., Q.B., p. 75) was quoted in the argument. In that case some one had accidentally dropped a bundle of bank notes in a public shop. The shopkeeper did not know they had been dropped, and did not in any sense exercise control over them. The shop was a place where all the public resorted and a customer who happened to go there picked up the notes and gave them to the shopkeeper to find out the owner. The owner was not found and

the finder then sued the shopkeeper for the notes. It was held that he was entitled to do so. The learned Chief Justice distinguished this case on the ground that the notes were dropped *in the public part of the shop* and consequently were never in the custody of the shop-keeper, or "within the protection of his house."

The principle upon which such cases have to be decided is thus stated by Pollock and Wright in their Essay on Possession in the Common Law, p. 41.

"The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence...... It is free to any one who requires a specific intention as part of a *de facto* possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real *de facto* possession constituted by the occupier's general power and intent to exclude unauthorized interference."

Mischievous animal—Evidence of Scienter—Ferocious dog.

Osborne *v.* **Chocqueel** [18c6, Vol. II, Q.B., p. 109].

In actions for injury sustained by a man through the bite of a dog, the scienter which it is necessary to show is that the dog had a ferocious disposition towards mankind, that he had bitten or attempted to bite mankind. It is not sufficient to show that it had to the defendant's knowledge, chased and bitten a goat.

Legal Practitioners' Act—Touts.

In re **Kuar Bahadur** :—

In taking action under S. 36 of Act No. XVIII of 1879 as amended by S. 4 of Act No. XI of 1896, the High Court, after recording evidence which proved to the satisfaction of the Court that certain persons habitually acted as touts, called upon such persons to show cause on a date fixed why they should not be dealt with according to the provisions of the section referred to above. The persons so called upon were invited to give any evidence they could produce to rebut the presumption that that they habitually acted as touts, and they were also permitted to give evidence on oath on their own behalf if they wished to do so.—*The Allahabad Weekly Notes.*

Indian Penal Code—Desertion of Child.

Queen Empress v. Mirchia :—

A woman who was the mother of an illegitimate child aged at the time about six months left the child in charge of a blind woman in whose company she was, saying that she was going to get food and would return shortly. She went away to another village and did not return. Apparently she never intended to return. Upon these facts it was held by *Blair* and *Aikman JJ.*, *dissentiente Knox J.*, that the mother of the child could not properly be convicted of the offence defined by S. 317 of the Indian Penal Code.—*The Allahabad Weekly Notes.*

Trespass on Burial Place—Entry with owner's permission.

Queen Empress v. Subban :—

Held that persons who entered upon a burial place and ploughed up the graves were liable to be convicted of the offence defined by S. 297 of the Indian Penal Code notwithstanding that their entry on the land was by the consent of the owner thereof.—*The Allahabad Weekly Notes.*

Limitation—Appeal—Minor.

In re **Brij Mohan Lal** :—

Section 7 of Act No. 15 of 1877 will not apply to extend the time limited for filing an appeal, the right to appeal having accrued when the would be appellant was a minor, that section applying only to suits and applications.—*The Allahabad Weekly Notes.*

Civil Procedure Code S. 257 A—Execution of decree—Agreement to give time to the judgment-debtor not sanctioned by Court.

Dan Bahadur Singh v. Anandi Prasad :—

A judgment-debtor asked for time to pay the decretal amount. The decree-holders agreed to give time on condition that the judgment-debtor gave them a hundi, for Rs. 1,500, that sum representing a portion of the decree-holders' claim which had been dismissed as barred by limitation. The judgment-debtor gave the hundi, but the sanction of the court was not obtained to the transaction. On suit by the decree-holders to recover the money secured by the hundi given under the circumstances mentioned, it was *held* that the transaction was one contemplated by S. 257 A of the Code of Civil Procedure that, as it had not been

made with the sanction of the court, it could not be enforced and the suit must be dismissed. *Hukum Chand Oswal* v. *Taharunnessa Bibi* (I. L. R., 16 C, 504) dissented from.—*Allahabad Weekly Notes.*

Cause of action—Plaintiff confined to cause of action set out in his plaint —Burden of proof.

Sheo Prasad *v.* Lalit Kuar :—

A plaintiff is only entitled to succeed upon the cause of action alleged by him in his plaint. So where plaintiffs came into court alleging a mortgage of the year 1854 made by their predecessor in title in favour of the defendant and seeking to redeem the mortgage of 1854, and it was found that the plaintiffs had failed to prove the mortgage of 1854, it was held that the plaintiffs were not entitled in that suit to a decree for redemption of other mortgages which might be found to subsist between the parties but which formed no part of the cause of action upon which the plaintiffs came into court. *Read* v. *Brown*, (L. R., 22 Q. B. D., 128), *Murti* v. *Bhola Ram*, (I. L. R., 16 A, 165), *Salima Bibi* v. *Sheikh Muhammad*, (I. L. R., 18 A, 131), *Ratan Kuar* v. *Jiwan Singh*, (I. L. R., 1 A. 194), *Paramanand Misr* v. *Shib Lal*, (I. L. R., 11 A, 438), *Fingari Singh* v. *Bhagwan Singh*, (Weekly Notes, 1889, p. 187), *Krishna Pillai* v. *Rangaswami Pillai*, (I. L, R., 14 M, 462), *Govindrav Deshmukh* v. *Ragho Deshmukh*, (I. L. R., 8 B, 543) and *Eshenchunder Singh* v. *Shama Churn Bhutto*, (11. I. A., 7) referred to. *Lakshman Bhisaji Sirsekhar* v. *Hari Dinkar Desai*, (I. L. R., 4 B, 584) and *Chimnaji* v. *Sakharam*, (I. L. R., 17 B, 365) dissented from ;—*The Allahabad Weekly Notes.*

Award—Decree on judgment in accordance with award—Appeal.

Ibrahim Ali *v.* Mohsin Ali :—

Where a decree has been made upon a judgment given upon an award and which is not in excess of and is in accordance with the award, an appeal from such decree will lie on the gound that the so-called award upon which the judgment and decree are based is from one cause or another no award in law ; but where an application to set aside the award on the ground of the misconduct of an arbitrator has been made under S. 521 of the Code of Civil Procedure, and such application has been refused after judicial determination and a decree made under S. 522 of the Code, which is in accordance with and not in excess of the award, no appeal will lie from the decree so made. *Bhagirath* v. *Ram-*

ghulam, (I. L. R., 4 A, 283) approved, *Maharajah Joy Mungul Singh Bahadur* v. *Mohun Ram Marwaree*, (23 W. R., 429), *Nand Ram Daluram* v. *Nemchand Jadavchand*, (I. L. R, 17 B, 357) and *Lachman Das* v. *Brijpal*, (I. L. R., 6 A, 174) referred to :—*The Allahabad Weekly Notes.*

Receiver—Power of District Court as to appointment of Receiver.

Amar Nath *v.* Raj Nath.

The concluding words of S. 505 of the Code of Civil Procedure—"or pass such an order as it thinks fit"—must be read as controlled by the words preceeding them, and do not confer upon the District Court the power itself to appoint a receiver not nominated by the Subordinate Court.—*The Allahabad Weekly Notes.*

Execution of decree—Limitation—" Subsequent application to execute the decree "—Meaning of term "granted."

Rahim Ali Khan *v.* Phul Chund.—

The "subsequent application to execute the same decree" mentioned in S. 230 of the Code of Civil Procedure means a substantive application for execution in the form prescribed by S. 235 of the Code.

Hence where an application for execution in accordance with S. 235 of the Code has been made within the period of limitation prescribed by S. 230 and has been granted, that is, execution has been ordered in accordance with the prayer of the decree-holder's application, the right of the decre-holder to obtain execution will not necessarily be defeated if, by reason of objections on the part of the judgment-debtor action taken by the court or other cause for which the decree-holder is not responsible, final completion of the proceedings in execution initiated by the application under S. 235 above referred to, cannot be obtained within the period limited by S. 230. Further application of the decree-holder to the court executing the decree to go on from the point where the execution proceedings had been arrested and complete execution of his decree would be applications merely ancillary to the substantive application under S. 235 and would not be obnoxious to the bar of S. 230. *The Delhi and London Bank Limited* v. *Reilly*, Weekly Notes, 1893 p. 124) overruled.—*The Allahabad Weekly Notes.*

Mortgage—Redemption—Limitation—Acknowledgment.

Dharman v. Balmakund :—

Held that an acknowledgment of the title of the mortgagor made by one only of two mortgagees would not avail to save the mortgagor's

right of redemption being barred by limitation, where the mortgage was a joint mortgage and not capable of being redeemed piece-meal. *Bhogilal* v. *Amritlal*, (I. L. R., 17 B, 173) referred to :—*The Allahabad Weekly Notes.*

Complaint—By whom a complaint of an offence may be made,

Farzaud Ali v. Hanuman Prasad :

The complaint upon which under S. 791 (c) of the Code of Criminal Procedure a magistrate may take cognizance of an offence may be made by any member of the public acquainted with the facts of the case, not necessarily by the person aggrieved by the offence to which the complaint relates. *In re Ganesh Narayan Sathe*, (I. L, R., 13 B, 600) followed ;—*The Allahabad Weekly Notes.*

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following Legal publications :—

The Educational Review for August and Sept. 1896 (*in exchange*).

Green Bag for July and August 1896 (*in exchange*).

Harvard Law Review for July 1896 (*in exchange*).

Allahabad Weekly Notes for August 1896 (*in exchange*).

The Canadian Law Times for June, July and Aug. 1896 (*in exchange*)

The Albany Law Journal from June to Aug. 1896 (*in exchange*).

The American Law Review for July—August 1896 (*in exchange*).

The Law Digest and Recorder for June and July, 1896 (*in echange.*)

The Chicago Law Journal for June and July 1896.

Mukurji's Indian Penal Code (*for Review.*)

Commentaries on the Indian Registration Act by Mr. A. Rajagopal Aiyar (*for Review.*)

Lord Russell on Arbitration :—We have read the address of Lord Russell before the annual meeting of the U. S. bar association. The speaker was a man who had achieved the highest forensic reputation and occupies next to the Lord Chancellor the highest judicial office in England. The occasion was a memorable one and the audience, perhaps, the most distinguished in all America. The subject was one which, in recent years, has come prominently before the public mind. The dis-

tinguished part which Lord Russell had played in conjunction with the present Attorney General of England, Sir Richard Webster as Counsel for England in the Behring Sea Arbitration peculiarly qualified the speaker to speak with authority. He was the bearer of a message from England to her Trans-Atlantic cousin. It is no wonder, therefore, that the speech of Lord Russell is admired on all sides for the words of wisdom which it contained. It is not that there is anything profound in the deliverance of Lord Russell, but the public, which, being prepared on all sides for a careful consideration of the question of International Arbitration was anxious to find a solution of the problem, was in a condition of receptivity which made every man echo the words of the Lord Chief Justice of England. As an eloquent appeal to the higher moral instincts of nations and governments, the speech deserves the careful perusal of all.

***

Sir George Parker:—Many people felt at the time of the departure of Mr. Justice Parker that they were losing a just, kind hearted, and tactful judge. Since his departure, the value of the qualities which he possessed has risen greatly in general esteem. The whole subordinate judicial service felt that they were losing a thoroughly reliable head. The relations between him and the profession were marked by no friction whatever. No doubt, he incurred the displeasure of the attorneys, as he was resolved to reduce the sometimes enormously heavy bills of costs which they presented for taxation. But nobody could deny that he was actuated in that respect by the best of all motives, namely, the reduction of the expensiveness of litigation. He had a sincere hatred of the forms and precedents of the original side, which, if left to himself, he would have brushed aside and replaced by the simpler and more intelligible provisions of the Procedure Code. But in whatever he did, he acted for the best, and never said an unkind word to the profession with which he was in daily contact.

***

The Madras High Court:—We have now six judges and if it is borne in mind that the Judge of the City Court does the business which would otherwise have fallen to the Original side of the High Court, we may say, we have practically seven judges. We do not think, however, that even this number is adequate. Several of the judges are seized with the anxiety to show disposal; and the Chief Justice probably is counting the cases that are disposed of every day. Naturally, he considers himself bound to show better *quantitative* results than when there

were only five judges in the High Court. But the authorities that are responsible for the financial administration of the country and who are perhaps looking forward to the time when they may dispense with the sixth judge—as the terms of the Secretary of State's despatch at the time of Mr. Justice Boddam's appointment make it clear—do not seem to be alive to the importance of adding to the strength of the High Court not merely numerically but also intellectually.

***

The Privy Council:—A colonial Chief-Justice was recently appointed a member of the Judicial Committee. This was certainly a step in the right direction as there are many points of colonial law which come up for decision before the judicial committee ; and though the decisions of the Judicial Committee generally command respect ,they would inspire more confidence, if a lawyer acquainted with the systems of law administered in the colonies had a seat in that august tribunal. But there is one matter to which attention is drawn by the English Law Journal in this connexion which we would most earnestly advocate. It is a great pity that the judgments of the Privy Council are always delivered by one judge. The decisions, it must be confessed, do not command the same general confidence that the decisions of the House of Lords do, though the individual judges presiding in both the tribunals are often the same. The reason of this difference is that, generally, each judge sitting in the House of Lords makes it his duty to deliver his own judgment, while in the Privy Counci , there is only one judgment delivered as the judgment of the whole tribunal. The advantage of separate judgments consists in the fact that in formulating his reasons and conclusions in writing, the judge gives full exercise to his faculties, and it may be, even where the conclusion arrived at by several judges is the same, the reasons may vary. The advantage to the profession is, therefore, great in its being able to follow the mental processes of individual judges which enabled them to reach the particular conclusion. The decision becomes, therefore, doubly instructive as a guide in future cases. For the reputation of the Privy Council and the interests of justice, we hope that the system of each judge delivering his judgment may be introduced.

***

The Bench and the Bar in Madras:—The relations between the bench and the bar in Madras are unhappily somewhat strained. Notwithstanding that the interests of the several branches of the profession practising in the High Court are at variance in some instances with each other, there is a strong unanimity of feeling as regards the bench

as at present constituted. It goes without saying that such a state of things is extremely undesirable, for the interests of litigants cannot but suffer, when there is an absence of cordiality between the bench and the bar. It was remarked by a celebrated English judge that in the mutual respect and confidence of the bench and the bar depended the safety of suitors. Since the departure of Mr. Justice Parker, the relations between the first bench and the professional men appearing before it have been marked by incidents of one kind or another which have excited a considerable amount of comment in the local newspapers. It ought to be remembered that mutual trust and forbearance is like oil to the wheels of machinery. We hope, that after what has occured, a better understanding will prevail. For, when the highest court of justice in the land fails to command respect, then, woe to the administration of justice.

***

The Deputy Registrar:—Mr. Todhunter has left the High Court; let us hope for good. During his short connexion he has not had an inconsiderable share in promoting the somewhat strained relations between the bench and the bar. He has busied himself in "*reforming*" the office of the High Court. We believe there is not one man in the office on the appellate side who does not possess some grievance against Mr. Todhunter. We have strong objections to the appointment of a raw civilian at the head of an office which is peculiarly one for which experience is the best qualification. The Deputy Registrarship should be held only by a professional man more especially as the Registrar happens always to be a civilian whose connexion with the High Court is generally very short. An officer utterly ignorant of the administration of law and of the proper vocation of the profession is not a fit man to be at the elbow of the Registrar. We hope that the vacancy now caused will be filled by the Chief Justice, by a professional-man of some standing, who will know how to deal with the office and the profession. Such an action on the part of the Chief Justice is absolutely necessary if the rules that have been made by the judges should be worked without unnecessary friction and with due regard to the administration of justice. It is only the other day that the judges passed a rule that the Deputy Registrar should have all the powers of the Registrar, a rule which was never thought of during the last 35 years of the existence of the High Court.

The Registrar has judicial functions to perform, for he decides finally without there being an appeal to the judges upon the court-fee payable in appeals preferred to the High Court. He has to decide whether a case shall be admitted at once and notice issued, or the case shall be

posted for hearing before admission. It seems highly inexpedient to vest these powers in an officer who has made no acquaintance with the laws in force in the land.

***

Dismissal of second appeals for want of copies of original judgments;—Among the many sensational things which have been reported in the daily press of the doings of the High Court, is a decision dismissing second appeals, because the appellant defaulted to produce a copy of the original decree or judgment even after the order of the Court. We have everywhere heard this decision of the High Court condemned as illegal. Section 541 of the Civil Procedure Code requires merely the judgment and decree appealed against. Applying this section to second appeals with the aid of S. 587, the appellate decree and judgment appealed against have alone to be produced in second appeals. This was decided by a Full Bench in *Pirathi Singh* v. *Vencataramanayyan* I.L.R., 4 M, 419. The High Court made a rule in 1883 that where a second appeal has been entered in the list of causes for hearing under S. 551 and is admitted without the copy of the original judgment or decree, the appellant shall produce it. The plain interpretation of the rule seems to be, that the appellant is not bound to produce the copy of the original judgment or decree, before the case is admitted after hearing under S. 551. But the Chief Justice and Benson J. apparently thought otherwise. They never, however, explained how the language could bear the interpretation which they placed upon it, namely that the appellant should produce the original judgment and decree *before* thehearing under S 551. Again a question was raised as to what should be the consequence of default. There is no rule laying down what should follow and no rule could be made contrary to S. 158 as that applied to second appeals as well, S. 652 limiting the powers of the High Court as regards the making of rules to such as are consistent with the Code. S. 158 compells the court to decide the case upon the materials before it. The learned Judges said nothing to this argument. It was moreover argued that under S. 652 no rule could be made requiring the production of papers which were by implication dispensed with under S. 541. There was no answer to this either. We have no hesitation in saying that the order of the Judges was both illegal and unjust. We hope there will be an appeal to the Privy Council to put an end to this kind of *summary disposal*.

***

Revision Cases and Letters Patent Appeals:—The Chief Justice is reported to have frequently expressed himself against Letters Patent

Appeals as vexatious and against revision petitions as trumpery cases. We believe there is no foundation for either of these remarks. The number of Letters Patent Appeals is entirely regulated by the fact whether the single judge presiding at the miscellaneous court is a careful judge possessing strict accuracy and penetration. Even with these conditions more than 20 per cent of the decisions appealed against had been interfered with in previous years—a larger percentage than in second appeals which come up from the decisions of mofussil courts. If a return were obtained of the decisions of individual judges upset on appeal under the Letters Patent we should hear less complaint about vexatious Letters Patent Appeals.

As to revision petitions under the Small Cause Act, it is generally forgotten that out of more than 2 lakhs of cases decided by the mofussil Courts under the Small Cause Act, the number of those in which the High Court is appealed to for interference is much below a thousand. This shows with what care S. 25 of the Act is put into requisition. One of the great advantages of the system of appeal or revision which is not generally underhood is that the possibility of interference by a higher tribunal exacts scrupulous care and attention from the subordinate tribunals in cases which may never be brought up for revision. The rectification of error in some cases prevents the possibility of errors in numerous others. Further more, the people of the country are poor and what is a trumpery affair to gentlemen drawing large salaries is often of vital importance to the poor litigant.

***

Lesson to the High Court:—We have been informed the High Court asked a District Judge to explain why the per-centage of convictions had fallen in that year much below that in the previous year. The District Judge curtly replied "because, Mr. W. was the Sessions Judge in the first year and Mr. U. (himself) was the Sessions Judge in the second year." We do not know what the High Court did on receiving this snub from the Sessions Judge. It seems to us they were ill advised in asking for explanation. If the Sessions Judge had improperly acquitted in any case it was open to the Judges when the calendar came up, to make such remarks as they thought proper or in appeal if there were any. But to ask a judge to account for, it may be, the error of his predecessor, was certainly not wise.

***

Relatives practising before Judges:—We understand that the High Court has passed certain proceedings stating that it was undesirable

that the brother-in-law of a Munsif should practice before him and expressing their intention to transfer the Munsif from his station if the practising brother-in-law does not leave the place at once. We cannot understand or appreciate the circular. The judges of the High Court know full well and they must expect the subordinate judiciary to be acquainted with the fact that Mr. John Kernan, Barrister at law, was practising before Mr. Justice Kernan when the latter was sitting with the other judges and even when he was sitting as the insolvent judge. Does the High Court mean to condemn this. It is well known that in England and in Ireland that sons practice before their fathers. Assuming that the conditions of this country are unfavourable to the growth of such a practice, it would be impossible to make an exception on principle. It is not easy either to define the degree of relationship which should be prohibited. In these matters a little commonsense will solve the problem, if there is any. If, in any case, it appears to the High Court undesirable that a relation should practise before a judge it is open to them to transfer the judge without making any fuss about it or laying down general maxims of inexpediency which cannot be universally applied. Transfers are not unusual in the judicial department and they excite no comment.

***

Thought He Would Let It Grow.—Judge Murphy has the reputation of being the severest man on the California Criminal Bench, and law breakers stand in great fear of him. The two State prisons are filled with men who can testify to the almost picturesque severity of that Judge's sentences.

A political friend of his tells of an occurrence which shows that the Judge is not forgotten. Judge Murphy was once called rather suddenly to Folson prison on some official business. In his hasty departure he had no time to arrange his toilet, so upon his arrival he stood in need of a shave. When the Warden was acquainted with his desires he took the Judge down to the prison barber, a big negro in stripes.

Judge Murphy took his seat; the barber tucked towels into his collar and lathered and rubbed his face.

"How long are you in for?" asked the Judge.

"Life, Sah," replied the barber, and commenced drawing the razor over the Judge's throat.

"What did you do?"

5

The barber paused in his work, but did not take his fingers from the Judge's throat.

"You oughter know, Judge," said he "you sent me"

"Is—is— that so?" gasped the Judge "say, hold on a minute. I think I'll grow a full beard," and he rolled out of the chair in a hurry.
—*The Chicago Law Journal.*

***

Qualified:—A little girl was in the witness-box, and as usual, before she was allowed to be sworn she was examined by the presiding Judge—Mr. Justice Maule—as to her understanding the nature of an oath and her belief in a future state.

"Do you know what an oath is, my child?" asked the Judge.

"Yes, Sir, I am obliged to tell the truth."

"And if you always tell the truth, where will you go when you die?

"Up to heaven, Sir."

"Are you quite sure of that?"

"Yes, Sir; quite sure."

"Let her be sworn," said Maule; "it is quite clear she knows a great deal more than I do."—*The Chicago Law Journal.*

***

A *Novel Offence*:—A novel prosecution took place in Adelaide, Australia, lately, when a bootmaker was fined a guinea and costs, for encouraging a constable in idleness. The bootmaker was found in his shop playing draught with the constable, who ought to have been on active duty at the time.—*The Chicago Law Journal.*

***

Roentgen's Rays in Court:—Roentgen's rays have made their first appearance in an English Court. Miss Gladys Ffolliott, an actress, brought suit against the Nottingham Theatre for injuries received in falling down the stairs from her dressing room. At the trial she put in pictures of her injured foot and of the other one, taken by the X rays, and got her verdict.—*The Chicago Law Journal.*

They Smoked Him out;—Smoking out an obstinate Juror is a new way of arriving at a verdict which was successfully tried by eleven good men and true, in Hartford, Conn, a few days ago. The obstinate juror stood out for a long time, and his will was only conquered when he became physically prostrated by the volumes of smoke that filled the jury room from the cigars, pipes, and cigarettes of the eleven other jurymen.—*The Chicago Law Journal.*

***

Property—Joint Finders—Intent.—One of several boys playing along a railroad track picked up an old stocking in which something was tied, and after he had swung it about in play for a time, another of the boys snatched it, or, it having been thrown away by the first boy, the second picked it up, and began striking the others with it. In this way it passed from one to another. Finally, while the second boy was swinging it, it broke open; and it was then found that the stocking contained money. All of the boys examined the contents together, and it was then found that the stocking together, and the money was given to an officer to await the appearance of the true owner. The latter was never found. *Held*, that, efforts to find the true owner having been unavailing, the money belonged to the boys in common. *Keron* v. *Cashmam*, 33 Atl. Rep. 1055 (N. J.)

The decision is rested on the ground that as none of the boys treated the stocking as anything but a plaything or abandoned article, the money within the stocking must be treated as lost property which was not legally found until the stocking was broken open; that, the boys being then engaged in a common enterprise, the money came under the control of all, and each had the intention to take possession of part or all of it; the boys should, therefore, be treated as joint finders. The case, on this ground, appears to be sound in principle and on authority. *Merry* v. *Green* 7 M. & W. 623. *Robinson* v. *State*, 11 Tex App. 403; *Durfee* v. *Jones*, 11 R. I. 588,—*Harvard Law Review.*

***

Chief Justice Denman:—It is said that Chief Justice Denman always exhibited signs of uneasiness when a really knotty point of law came before him.

***

Carriers of Passengers—Negligence—Evidence:—Testimony of a mother that the death of her child was caused by a cold contracted by exposure to cold in defendants' railway coach, was competent as tending to establish the cause of such death, where it was shown that such witness was forty-six years old and the mother of eleven children; that

the child in question was robust and healthy; that its feet and hands became cold, and it became sick and affected with sneezing and coughing and contracted a severe cold in the coach in question; that though it had the best of care and was subjected to no other exposure, it grew worse until it died; and that she had attended it constantly during such illness. (*Ft. Worth and D. C. Ry. Co.* v. *Hyatt* [Tex], 34 S. W. Rep. 677.)—*The Albany Law Journal.*

***

New Use of Dogs:—A new use has been found for dogs, namely as detectives of criminals. In *State* v. *Hall*, a recent trial for larceny in Ohio, the detective work of a dog was put in evidence. Some of the stolen property was found near the scene of the theft, and was shown to the dog, and then he was shown foot—prints close to it, and being put on the track, he followed it unhesitatingly some two hundred feet to a gate, then inside the gate up to two front outside doors, of which he chose the left hand one, then inside to the prisoner's door. It was shown that the dog had been trained to this business, and thoroughly and successfully tested, even where persons on whose tracks he was put had started twenty to forty hours before him. The evidence was admitted, and is justified by the authority of *Hodge* v. *State*, 98, Alabama, 10; 39 am. St. Rep. 17, a case of homicide. This is much more satisfactory evidence than the blundering, bull headed theories of human detectives, and there is no good reason why it should not go to the Jury. Dogs are always candid and honest, and never on the scent of a reward, and they have no pride of opinion. "The more I know of dogs," said Madame de Stael, "the less I think of men."—*The Green Bag.*

***

Counsel and Judge:—In an altercation between counsel and the judge, the judge, after several attempts at conciliation, remarked: "Well, I have done all I. can to promote peace, but the result reminds me very much of the fable of the old man and the ass."

The counsel, with visible irritation in his countenance wished to know which of those entities applied to him.

"Neither in particular," was the reply; "but considering our respective ages, you cannot object to my saying that I am the old man." —*The Green Bag.*

***

A Picturesque Judgment:—A man on trial in Illinois for horse stealing put in a plea of matrimonial insanity "Matrimonial insanity,"

exclaimed the judge: "that is a novel defence; however, let us hear the evidence. A witness deposed that during the ten years he had known the prisoner, the latter had married half a dozon times, and was living with wife number six at the time of his arrest. "They were all a sorry lot," he continued "and they kept the poor man constantly in hot water by their peevish, scolding, quarrelsome dispositions."

After this account of the prisoner's matrimonial tribulations had been confirmed by other witnesses, his lawyer made an eloquent appeal to the Court, concluding with the plea that his client could not be held a responsible agent after being galled by such xantippes for ten years. This skilful "touch of nature" was sufficient for the judge, and he charged the Jury this: "This Court had a certain amount of matrimonial experience with one female, and such experience has not been altogether of a satisfactory character. But here is a man who has been so blind, imbecile and idiotic as to marry in ten years six horrible scolds and shrews. For so doing I class him as a natural fool; and even if he possessed any intelligence the dwelling with these women must have destroyed it. The plea of the counsel for the defence is sound in-law and equity, and I charge you to bring in a verdict of acquittal. The jury did as they were bid":—*The Green Bag.*

***

Alleged Alarm Amongst the Mussulmans in India:—*Lord Stanley of Alderly* asked whether the Secretary of State for India was aware of the alarm prevailing among the Mussulman subjects of her Majesty in India, owing to a recent decision of the Judicial Committee of the Pivy-Council in the case of *Abul Faiz Mahomed Ishak* and others v. *Russomo Dhar Chowdry* and others the effect of which was to abrogate an important branch of the Mussulman law—viz., that relating to family wakfs or the law relating to the creation of benefactions for the support of the endower's family, with the reversion for the general poor; whether it was not the fact that the full enjoyment of their law and religion, usages and institutions, so far as they did not conflict with the statutory enactment had been guaranteed to the Indian Mussulmans by her Majesty's proclamation. The law in question related to one of their most cherished institutions upon which depended the prosperity of their principal families which have rendered important services to the State in time of danger; whether it was not the fact that numerous memorials had been presented to the Indian Government against this Judicial decision; and whether they had not prayed for declaratory Act declaring the validity of the law which had been held to be invalid;

and what steps the Government proposed to take to redress the wrongs inflicted by this decision of the Privy Council

The Earl of Onslow.—It is the fact that full enjoyment of their law and religious usages and institutions has been guaranteed to the Mussalman population of India by Her Majesty's proclamation; but the case to which the noble Lord has called attention was decided by the Privy Council strictly in accordance with Mussalman law. It was a case in which a remainder to the poor was inserted merely for the purpose of perpetuating a bequest to the family of a testator, and in accordance with the Mussalman law it was held by the Privy-Council not to be valid. The noble Lord asks whether it is not the fact that numerous memorials have been presented against the decision. The India office is not aware that any memorials have been presented, and it is quite certain that they were not numerous. It may be that the parties in this case presented a memorial, but no others are known of. The Government of India does not propose to take any steps to redress the wrongs which the noble Lord imagines to have been inflicted by the decision, and if any representation is made on the subject it should have been to the Local Government, who will be able to introduce legislation.

The Lord Chancellor.—My Lords, I cannot allow this occasion to pass without entering a protest against the precedent set by the noble Lord. It is quite within his right, if he thinks proper, to ask Her Majesty's Government whether they mean to alter the law: but to argue a judgment of the Privy-Council—a matter over which, I may point out, your Lordships have no jurisdiction at all—and to use such language as the noble Lord has thought it right to use—namely that the Judges have altered the law, and that wrongs have been inflicted by their decision appears to me neither a decorous treatment of the highest legal tribunal in the land nor a very desirable precedent to set; and, further, it is not calculated, I think to add to the dignity and impression which the judgments of the Privy Council make in those places where observations such as those of the noble Lord are likely to do more mischief than good. The noble Lord must assume that this is the law, because when once a decision has been given by the highest Court of Appeal, it becomes the law of the land. Therefore, the noble Lord's course should be to alter the law and not to make observations on the character of a judgment which may do no little harm in the country affected. I want to say this, further that when the noble Lord examines the judgment and comments upon it and reasons with it, he is in this difficulty. I am making this protest because I was not a

party to that judgment. If I had been I should have refused to say a word, and I do not suppose that any one of the learned judges sitting in the House who were parties to that judgment would condescend to argue with the noble Lord whether their judgment was right or wrong after they had once delivered it. They would tell the noble Lord to look at the judgment and read it and—may I add?—understand it before he comments upon it.

Lord Stanley of Alderly said he understood the noble and learned Lord to say that the Privy Council made the law. For that reason it was justifiable to ask that Her Majesty's Government should alter it.

***

Suretyship—Securities Given To Indemnity Surety—Rights of Creditor.—The maker of a note deposited securities with his surety out of which the surety might reimburse himself in case he had to pay the note. Both maker and surety having become insolvent, the payee of the note filed a bill in Equity asking that the securities be applied in payment of his note. *Held*, that upon the insolvency of the principal, the surety had a right to apply the securities in payment of the note, and to that right the payee, especially in view of surety's insolvency, was entitled to be subrogated *First Nat'l Bank* v. *Wheeler*, 33 S. W. Rep. 1093 (Texas).

The cases are in a hopeless state of confusion as to what circumstances, if any, give a creditor the right to have securities deposited under a contract of naked indemnity applied in payment of the debt to him. It has been held that immediately on the deposit of the securities such an equitable right arises in favor of the creditor. *Moses* v. *Murgatroyd*, I Johns, Ch. 119; *Morrill* v. *Morrill*, 53 Vt. 74. Again, that such a trust arises in the event of the insolvency of the surety. *Lewis* v. *Deforest*, 20, Conn. 427. A third view is that if the estates of both the principal and surety are bankrupt, the creditor may compel the securities to be applied in payment of his debt (*ex-parte Waring*; 19, Ves. 345); and a fourth, that the surety, even in the event of a bankruptcy of both the principal and surety, has no recourse upon the securities except to reimburse himself for payments made on the creditor's claim; the particular creditor in such case has no higher right in the securities so held by the surety than has any other creditor of the surety. *Royal Bank* v. *Commercial Bank*, 7, App. 366; *Poole* v. *Doster*, 59, Miss. 258.

The doctrine of *Poole* v. *Doster*, Supra, is, it is submitted, the one to be preferred; it gives to the contract under which the securities were deposited the operation which the parties intended it should have; it is not open to the reproach of giving to them particular creditor a pre-

ference over other creditors for which he did not bargain, and which the principal and surety did not intend he should have. See 1, Harvard Law Review, 326.—*Harvard Law Review.*

***

Torts—Lunatic's Liability for Negligence.—Held, where a vessel in the exclusive control of one of the joint owners, who has chartered it, is lost through his negligence, he cannot defend an action by the other owners by showing that his want of care was due to temporary insanity, though such insanity was caused by his efforts to save the vessel. *Williams* v. *Hays*, 37 N. Y. Supp. 708.

In a former adjudication of this same case, the Court of Appeal, left open the precise question now passed upon. *Williams,* v. *Hays* 143, N. Y. 442. There are few decisions on the subject of the liability of insane persons for torts by negligence, and the text writers appear to be in great conflict. Some of the latter hold that insanity is no defence. *Shearman and Redfield* on Negligence S. 121; *Cooley* on Torts 2nd Ed., 117. Others incline to the view that insanity should in some cases be a bar. *Beven* on Negligence, 20 Ed., 52—55; *Wharton* on Negligence, S 88; 2 *Jaggard* on Torts, 872; *Clerk and Lindsell* on Torts, 11, 34. The true view seems to be expressed by *Mr. Justice Holmes.* "If insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse" Holmes, the Common Law, 109—*Harvard Law Review.*

***

We take the liberty of extracting the following from an interseting article on the "Practice of Law in New York City" by *Thomas Fenton Taylor.*

* * * * * * *

Not reckoning the Federal Surrogates, and criminal courts, our twenty-five (at times twenty-seven) judges of civil courts of record in New York City began business in October, 1895, with calenders aggregating nearly twenty thousand issues, at law and in equity, awaiting trial under the ministrations of a bar so crowded that we have one lawyer for somewhat less than every three hundred of the population. Besides this, there are all the cases on first appeal to the General Terms, and the vast business of *ex parte* and contested motions.

On an average this would give each member of our bar less than four pending litigations. As a matter of fact, some lawyers in lucrative

practice pass long periods of time when they have no litigations at all. On the other hand, the calendars reveal some lawyers having a large proportion of the cases, who are in no wise conspicuous in the profession.

The bar generally could not be supported out of the litigated business. Its steady support comes from office or non-litigated work, and this is true in the long run even of those firms that practise heavily in the courts. This—but not this alone—should chill the untried youth who comes to us with a constitutional yearning for immediate forensic triumphs.

The crowd in the profession signifies more than mere members; nowadays this crowd has a higher average of training, ability, and purpose than ever before. Moreover, it counts many men who have all these qualities and independent means to boot; and who can cheerily bide the period when, as is jocosely said, they have no business, being young lawyers. All kinds of occupation here, professional or commercial, are so fitted that a man mistakenly fitted for a given career finds little to hope for in change. But what activity shall he resort to, to keep off rust or melancholy?

The young lawyer of literary ability who in his days of light practice appears too conspicuously as a writer lessens his chances professionally. The financial returns from writing a law treatise, even one that is well received, are surprisingly small. The likelier result of such a book is that it may win the author a good salary with some prominent firm, or, if his youth is not too glaring, will bring him fees as counsel or brief-maker in his specialty.

The rural districts send some better-class lawyers to our legislature; but this city quite invariably uses for that purpose only the poorer stuff at our bar. At times—about once in a quarter of a century—there is an uprising of decent citizens against our corrupt municipal rule. Then young attorneys shine forth as reformers. But for them the success of Reform does little else than set their altruism in a strong light. The present Reform Mayor, in June last, found more than three hundred and fifty of them anxious to sit in the fourteen judicial places then at his disposal. Thus it appears that the competition of beginners *inter se* in the profession and in its collateral activities is now very strong. But though this is the mildest factor in the entire competition that exists here, the younger generation are undaunted. As Mr. Joseph H. Choate expressed it at the Langdell celebration, Mr. Carter will soon retire, and a thousand young men are coming to take his place.

Thus almost ideal opportunity will be offered to the merciless law of the survival of the fittest. New comers may take heart on learning that the best of our lawyers have come through hard—in some cases very hard—beginnings; that the best of our lawyers are and consistently have been lawyers simply, and attend to collateral matters of public concern merely by surviving, by continuing on hand at one's office,—not necessarily in mere idleness,—there is always a chance that business will begin; that business well done breeds business; and the strange fact that this city not only allures but she consumes. Old New Yorkers are a trivial minority of the population. Everybody of present consequence here, including the leaders at our bar, came from somewhere else. There are no hereditary or family law firms. The son of a distinguished dead or retired father may be brevetted into the firm merely for the name's sake. Very probably ninety per cent of the rank and file of the bar are immigrants to this city; and the concentration at this point is so strong that we regard even Brooklyn as provincial.

Many lawyers come to this city because they aspire to be simply lawyers, whereas in the country districts they must be politicians to succeed as lawyers. Provincial lawyers, even if of distinguished success elsewhere, seem usually to feel a strange necessity to explain why they are not found at the metropolitan bar; yet the out-of-town feeling as to the city bar is so sensitive that a lawyer from this city, no matter how able or prominent, must exercise caution in caring personally for his client's rights before a rural jury. On the other hand, our metropolitan juries neither know nor care where lawyers hail from, and there are now at our bar several men who, after some years of uneventful provincial practice, were transplanted here to almost immediate distinguished success.

Immemorial lay prejudice against our profession must still be faced in New York City. Probably if Jack Cade were to appear here with his unholy purpose of killing off all the lawyers, his following would not be small, and would include some really successful litigants. People who know nothing, who know little, and who know much, meet on common ground in having their fling at our profession. The burden of this always is that any lawyer will maintain that black is white, or do much worse, for a fee. The laity forget that the lawyer is the client's reflection, his *alter ego*, and that our system of trial, however imperfect, is still the most perfect way known among men of determining a question of fact. The system would work perfectly if those who apply were perfect. Attorney and client are the terms of a relation. Human beings in all their variety of moral significance, when in need of a lawyer,

match themselves up with lawyers of corresponding moral worth. Thus in this crowded centre the bar must be most heterogeneous in order to supply the demand of this morally much diversified litigating public, and a lawyer who has practised long enough to have his character known will finally have a clientage on the whole suiting that character. A layman may not know, and very rarely does know, a lawyer's merit *qua* lawyer, but the character or reputation of his legal adviser he may fairly estimate. Experience justifies the belief that, with few lamentable exceptions, where there is any difference in moral status between lawyer and client, the former is the better of the two. As a rule, the recording angel will do well to keep both eyes on each, and to prepare to weep in case the lawyer ever receives his client's money save under stress of necessity, or holds it from the client one minute longer than he must. He should not allow the client to order this otherwise.

The writer has known of instances in which clients have proposed to young lawyers in this city elaborate schemes of knavery, without previous reason for the clients to believe that the lawyers would approve of such knavery. In one or two instances the young lawyer temporized in order to call in some brother lawyer that the scheme might be detailed before witnesses merely as an incredible curiosity. Probably there is not at the bar to-day an experienced member of honorable standing who has not had at the bidding of the laity a high-priced chance to depart secretly from his record.

* * * * * * * * * * *

The line between civil and criminal practice is rigidly fixed. The vast majority of the profession knows little or nothing about the Criminal Codes, and not infrequently one meets a well informed lawyer who knows only vaguely where the criminal courts are held. There are of course a very few notable exceptions to this. But, as a rule, a leading lawyer in civil practice as little thinks of defending a criminal as he thinks of filling the pulpit on Sunday in one of our large churches. Several men of the high rank at the bar as trial lawyers have lately gone into the criminal courts on emergencies. In one instance the experimenter, as soon as his task was done, fell seriously ill. In others the distinguished novices admitted having been nervous and sleepless, and professed a distaste, if not an incapacity, for that branch of law. Bad as all of our court-rooms usually are, the criminal courts till just now have been so much worse that a strong stomach seemed a *sine qua non* for practising in them.

The entire bar now depends on the great libraries in the city for research. No law office pretends to have all the books it may need.

The older lawyers have libraries too extensive to discard, and not full enough to be a sole dependence. The younger lawyers suyply themselves simply with a few books on local practice, and digests of local reports.

Many local lawyers persist in the fallacy that law is not a business; that the profession must not become commercialized. Some such even refuse to have bill-heads, lest the law might thus be assimilated to mere ship-chandlery. Obviously there are other and better means than this of substantiating the dignity of the profession, and until these lawyers dispense with bills as well as bill-heads, their humbug will be too plain to be harmful.

The philosophic lawyer haunts the studious cloister, and is intrinsically not a money-getter. In the long run, even in New York City, he is indispensable to the correct practice of the law, even by a money-getting firm. Te every member of our local bar the might of the dollar is steadily, often painfully, present. Adam Smith declared that, "if lawyers were not paid, they would do even worse work than they do now." But as he reasoned *a priori*, the profession need not take his slur too much to heart, but may depend on the frank authority of one schooled by local experience. Such a member of our local bar, who had served professionally. but only incidentally, in procuring the franchise for running cars on Broadway, and who has also filled a judgeship in an important local court, declared under oath before our Senate Investigating Committee that it is impossible to practise law here "on wind." The discrimination of the witness between what is and what is not wind was justified by a charge of fifty thousand dollars.

The young man who to-day enters our profession hereabouts simply on his merits, to win its rewards beginning with a bare living for himself, must face competition at least as pitiless as any similarly equipped youth may find on starting into any trade or business on Manhattan Island. In fact, nothing in the "help advertisements" of our local newspapers for any kind of trained high-grade service quite parallels the offers of cheap work constantly made in our Law Journal by members of the bar bred at college and law school.

Members of our bar who have recently published books have informed the writer that there is no difficulty whatever in procuring men of well trained intellect to do the drudgery incident to such publications very cheaply, and that while the sober, 'steadfast, and demure of these stand by such work for beggarly pay, others of cheaper faculty and schooling make a break for independent business, and in some way get ahead.

The chasm between the tyro and the successful lawyer is enormous; it is made so, not so much by the legitimate differences of age, experience, learning and ability, as by the older man's material accidents, largely capable of being expressed in dol'ars,—that is, well equipped and extensive offices at an annual rental of two to four dollars per square foot of floor surface, membership in prominent expensive clubs with long waiting lists, and similar advantages.

This showing persuades persons of a certain not rare quality of mind that to succeed at the bar it is needful to be spectacular. Young men of this species hire offices beyond their means, talk loudly in elevators and public places of representing influential clients and vast interests wholly imaginary; they announce their lack of time to take lunch, and if their antecedents are not too easily traceable such young men come before this community with engraved announcements that they are about "to resume" practice at the metropolitan bar. It may be that law makes one fussy, for Chaucer says his man of law was the busiest of men, and yet "seemed bisier than he was."

Older men of this stripe make the local competition more factitious than ever, not only by grasping business and having obtained it by working out of it a fee from every point of view, but by utterly absorbing all the credit for work and professional skill, though such credit belongs to others kept in the shade. The writer has heard a man of this sort, a highly successful money-making member of our bar, say that long ago he discovered that, the more law he read, the less he knew: that it was merely business which a successful lawyer needs here; that the best of law is to be had cheap; and that the chances are that if Lord Mansfield were a young member of our bar to-day, he (the money-maker) would have him in his office at fifteen hundred dollars a year.

Clients select legal advisers, as lawyers select dentists,—largely on faith. To this, of course, there are exceptions, especially in the case of great corporations. The latter often select a lawyer with great nicety as to his merits as a lawyer. A corporation may have a lawyer selected with this nice discrimination in each locality where the corporate work is done, and, more than that, it often selects a lawyer with reference to his peculiar fitness for the special piece of work.

All clients, however, do appreciate that lawyers are legion, and that they work for pay. The day is at hand here when clients run from office to office to get their legal services done by the lowest bidder, and in this they are aided and abetted by many of the profession. This is particu-

larly true in regard to actions for tort, proceedings to vacate assessments, and as to searching titles. In regard to torts, arrangements amounting to champerty and barratry are not uncommon, and in regard to searching titles such arrangements are made occasionally as have resulted in the lawyer having finally either to break his contract or to serve without pay and expend more for disbursements than the entire sum "to cover all" for which he had agreed to examine the title. Recently the writer discovered two men named executors in the will of a person just deceased, running from lawyer to lawyer to get the lowest bid for the entire legal service in settling the estate. The cause for their peculiar zeal was probably that they were the residuary legatees.

None of the law partnerships hereabouts savor of mutual insurance between the members, or are in any wise sentimental, albeit single members of such a firm may now and then write or speak in public as communists or socialists. The dividends or share of profits fit each member's personal value as rigorously as if the subject matter of the business were beef or wool. Many of the large law firms employ cashiers as in a mercantile house, and often a member of the firm is such distinctly as its bagman, its drummer-in of business.

There is no common mould for these men; law schools do not fit them for their special activity. This one is prominent in politics, that one in the church, another gives club dinners to representative business men, all are kindly to reporters, all laboriously angle for fees; and it is not unheard of that clients employ such men's firms for the bold purpose of getting into relation with or near to a notability. In fact it is finally true that this bagman, however pretty as a lawyer, is the distinctive mark of his firm, however excellent as lawyers his partners may be. Many law firms serve corporations or large commercial houses for a yearly stipend. If it be a firm in "mercantile practice," and a jobber or retail merchant comes to it to be put through insolvency, this firm may learn by telephone what, if anything, the bankrupt owes to the wholesale client, and may see that in some mode the wholesaler's debt is preferred; and thus the large commercial houses find it profitable to have such mercantile law firms under steady pay.

It is known that the law business of a corporation is procured and held by marked courtesies to the directors. That the counsel to a corporation should, during his retainer, support a poor relation of a director, is an actual instance of such courtesy, perhaps an extreme one. Manufacturers, fiercely competing for the heavy profits in some dress fabric for which a passing fashion may create an enormous demand, easily finds allies at the bar to bring innumerable suits for infringement

and injunction. It is never intended to try these suits. They are brought for advertisement, and to fluster small buyers. There are lawyers in this city who keep up steady relations with the reporters. When such a lawyer seeks foreign capital to vitalize a struggling mining corporation in Pennsylvania, the reporters loyally give out that he represents in Europe the vast interests of the Pennsylvania Coal Company. There are numerous others who fight their way to a steady incidental income out of costs from the endless motions with which they ingeniously harass an opponent as long as a litigation lasts. A brother lawyer told the writer of deliberately fighting his way thus into one hundred dollars a month steadily.

Recently, the writer received a luxuriously printed pamphlet, describing a banquet by a law firm, given freely, including wine and speeches, to numerous men of substance and influence likely or desirable to be attracted to a pending business adventure. Among the pointed sparkling responses was one by a member of this firm known to be an exemplar of what is called the "new and progressive methods and ideas." He proclaims that the distinction between the lawyer and the business man has vanished; that the lawyer is no longer the ill fed chap with a green bag snivelling for a fee, and constantly ridiculed in the older comedies; but that he is to-day the indispensable guide to the business man, and should constantly be in his client's counting room or ready by telephone. This view of the relation enables the lawyer to say to his wealthy client. "Your trust in me is fully justified. Don't draw a long will showing your intentions in detail, but leave your accumulated treasure to me absolutely as residuary legatee; I will distribute your fortune after your death as you may secretly instruct me, or as you would if living have given it under my advice." In this view, too, the lawyer is transformed into the promoter and broker, and goes abroad as the agent of trusts. In fact, the largest item in some of the great charges made by lawyers in this city within the last ten years has been simply brokerage. Some lawyers abroad for foreign capital at the time the house of the Barings was shaken have been stranded there ever since, showing that the "new method" is not necessarily progressive.

Corporations furnish bonds and security needed in all manner of legal proceedings; they have long stood ready to be executors, trustees and guardians, and are more and more made use of for those purposes; they have, as shown later in this article, about absorbed title-searching, and a few months ago the birth of a local corporation was announced to give legal advice by written opinions in answer to written inquiries, for

two dollars and fifty cents apiece, postage included. This is an approximation to practising law "on wind" and the writer regrets he cannot report the result so far. Thirty years ago, the late John K. Potter alleged that to be a corporation was negligence *per se*. There has been a great reaction, and it is now negligence *per se* to attempt anything except under corporate guise. We may expect even to hear of corporations formed to furnish testimony,—if not indeed to testify on trial.

* * * * * * * * *

Since 1848 we have had an attempt by our legislature to fix our civil practice by three thousand eight hundred and seventy paragraphs of statute all told, which for some years back have been amended on the average of eighty-five paragraphs a year. The cases in which the merits have been suspended that a question as to new practice—the meaning of some part of this Code—might be fought out before the courts at great delay and expense of the litigants, are myriad, and, though the reports of them fill many volumes, the pitfalls are not yet all known. The writer has known of an amendment to result from a letter by a young lawyer of meagre experience to a friend in the legislature. The thousands of annotations to this Code can be safely used only by finding the exact wording of the section passed upon at the date of the case. But, however, often a section may be amended, all cases on it in its various stages follow it while it lasts. It is scarcely too much to say that an expert in our practice cannot be sure of knowing it over night. Older lawyers tired of this long ago. In cases where there are a multitude of counsel, it is not unusual, when a question under the code comes up, for the seniors to say, "Let the young men fight that out."

The writer has recently known of a litigation hotly contested to judgment, in which both the attorneys and judge knew nothing of a new section of the Code controlling the chief point in the case. Revision of all this Code is again imminent, but scientific codification is not in sight.

The multitude of judges before whom a case in its many phases may have to pass is a risk of litigation. To a degree, it is like handing around a kaleidoscope, and expecting each person to see the same figure in it.

* * * * * *

Owing to the variety of mind on the bench, cases are nursed by counsel so as to avoid certain judges and to come before others. Nobody expects one kind of law from all the judges.

* * * * * * *

If our judges would resent carefully and promptly the deliberate mis-statements constantly made by lawyers on arguments, they would

even by that do much to elevate the tone of the bar, to ease practice, and to save time.

* * * * * * * * *

Young men on first coming to this city covet places in the big offices. Some such offices hire an additional room merely for such comers to sit in. The writer knew of such a room where these young men, nearly a score of them, and in excess of the available chairs, were licensed to exchange their items of information and speculative opinions uninterruptedly till nature took its course with each. There are a few successful lawyers who keep a hand out constantly for the best material of the leading law schools, and not only use it to keep the make-up of their firms in a constant state of flux, but send out from their office new firms of importance. Most of the members of heavy law firms dissuade young men from coming to them, and pray there may be a "close season" of at least three years on young lawyers. There are instances where the merit of new coming young men is impressive, in which prominent lawyers have generously bestirred themselves to procure beginnings with small firms for the tyros. There are instances too of young men coming into brilliant success and grand prizes by clinging to a big office but these are a very small percentage of all who try for it, In some such cases men must submit to years of routine of such quality as watching the calendar. In fact, the writer once heard a keen counsel allege in open court, when his opponent's clerk was wanted but could not be found, "Oh, he can't come, My learned adversary keeps that man in his office just to swear to affidavits all day long to meet the exigencies of his practice." The useful clerk in a large office must not flinch at having to argue in court legal propositions that his employers are hurried into, but which are obviously preposterous. Rivalry between aspirants in the same office is not always inspiriting and generous, but partakes of the nature of a suppressed family quarrel.

Sometimes a thorough-bred but anonymous lawyer maintains for years simply a salaried place with a heavy firm, and. lacking the knack to become part of it, faces the cold world when his own blood is no longer of full warmth. Usually after a year this person is seeking a salary again. Clients seem to incline against one who has for years persisted in drowning himself in a tumbler. They like those who try for themselves young. A short term of service in the office of a busy practitioner is no doubt useful; but, taking the bar as a whole, the largest percentage of cases in which a fair success has been made is of those whe strive early in life for professional identity. "To be thrown upon one's own resources is to be cast into the lap of luxury," Franklin asserts. This no doubt means when the chief resource is youth.

The student just leaving the law school may guess from such commonplace existing circumstances as have been here set forth how widely our local practice of law differs from his school duties of evolving the eternal verities out of printed statements of fact in selected cases under the kindly guidance of a professor. Such student will quickly foresee how he must soon face the dilemma. "Shall I be intrinsically the lawyer (like Lord Mansfield) at the risk of only fifteen hundred dollars a year, or shall I refuse to quarrel with my bread and butter, and make my success conspicuous by unlimited creature comforts?" This question each man must settle for himself. Those who decide in favour of bread and butter uniformly shift upon fate all responsibility for their choice.

Any law school worthy the name develops in her sons an incapacity to choose any but the lawyer's side of this dilemma, and in that alone inclines men to the ways of pleasantness and peace. This article is not pessimistic, but it does not favour the so-called new but really destructive methods. The lawyer thoroughbred and conservative, who seeks to find the facts as they are immutably and apply to them frankly the law as it is, who avoids the meretricious risk and incidents of public trial, still exists.

The amount of good such lawyers do, unheard of, is enormous. The service such a lawyer renders his client is of great intrinsic value; it is suitably rewarded. The relation of attorney and client in this light, and not as a conspiracy to do all that self-interest may prompt, and which by defect of laws is not yet a state-prison offence, may stil be found, and merits all that has been eloquently said of it.

The careers of the present leaders of our bar teach nothing with greater certainty than that

"Fearless virtue bringeth boundless gain."

Harvard Law Review.